

ATTACHMENT 1:

LAGGARD IMPLEMENTATION

TIMELINES

Attachment 1: Laggard Implementation Timelines

In putting together this summary, Covad has assumed a “Merger Closing Date” of September 1999.

1. *Federal Performance Parity*

- Connecticut: Not implemented until September 2000; no penalties paid until December 2000.
- Arkansas, California, Kansas, Missouri, Nevada, Oklahoma, Texas: Not implemented until November 1999; no penalties paid until June 2000.
- Illinois, Indiana, Michigan, Ohio and Wisconsin: Not implemented until February 2000; no penalties paid until June 2000.

2. *OSS Enhancements*

- In best case scenario,⁴⁵ uniform and standard application-to-application interfaces, uniform OSS graphical interface (§§ 9-11), will be provided in SBC-Ameritech states (except, inexplicably, Connecticut), by September 2001. In Connecticut, these interfaces will be available in March 2002. SBC-Ameritech’s obligation to provide these obligations will expire in September 2002.
- In best case scenario, deployment of software for CLEC local service requests (§ 14) will be provided in SBC-Ameritech states by March 2002. SBC-Ameritech’s obligation to deploy that software expires in September 2002.
- In the best case scenario, SBC-Ameritech will develop and deploy enhancements to EBI interfaces (§ 13) in California, Nevada,

⁴⁵ That is, if no CLEC disputes SBC-Ameritech’s plan in “Phase II” of implementation. *See* § 11(b). Phase II is the *only* chance CLECs have to participate in the SBC-Ameritech 13-state process, and SBC-Ameritech’s proposed timeline has Phase II lasting a preposterous one month. If Phase II lasts longer than a month, the final implementation deadline is pushed back. What this means in the end is if Phase II lasts several months, the time of SBC-Ameritech’s obligation to provide these OSS Enhancements expires commensurately. In Connecticut, SBC-Ameritech’s obligation to provide will simply expire unimplemented if Phase II lasts only seven months – a not unreasonable expectation, given the possibility of arbitration of disputes.

Texas, Oklahoma, Arkansas, Kansas, and Missouri no earlier than September 2000, and its obligation to provide those enhancements will expire on March 2002. In Illinois, Indiana, Michigan, Ohio, and Wisconsin, SBC-Ameritech need not develop and deploy those same enhancements until September 2001 at the earliest. Strangely enough, in Connecticut, SBC-Ameritech need not develop and deploy these same enhancements *at all* – because even under a “best case” scenario, the earliest those enhancements need be made available in Connecticut is 30 months after the Merger Closing Date, the same date that the obligation of Paragraph 13 expires!

- In a best case scenario, a uniform change management process will be fully implemented by September 2001 (§ 15; 12 months to “negotiate with interested CLECs” a contract that contains “a 12 month developmental view”). SBC-Ameritech’s obligation to provide this uniform change management process expires on September 2002.
- In a best case scenario, in all states but Connecticut, SBC-Ameritech will develop and deploy enhancements to Datagate or EDI interfaces for pre-ordering xDSL and other Advanced Services components by November 2000 (§ 16). In Connecticut, SBC-Ameritech only commit to make these enhancements available in March 2001.

3. *Electronic Pre-Order Access to Loop Pre-Qualification Information*

- In Illinois, Indiana, Michigan, Ohio, Wisconsin, Nevada, and Connecticut electronic access to loop pre-qualification information need not be available until July 2002, or twenty-two months from the Merger Closing Date (§ 21(b)). It should be noted that during this period, SBC-Ameritech’s retail operations will have access to this information.

4. *Obligation to Provide Line Sharing (§§ 33-34)*

- Even after the Commission orders line sharing, SBC-Ameritech still gives themselves up to a year to “phase in” compliance with that decision (§ 33). Only an ILEC would have the audacity to propose the terms of their own compliance with Commission rules.

Attachment 2:

Testimony of Clay Deanhardt

DIRECT TESTIMONY ON REOPENING
OF CLAY DEANHARDT

I. WITNESS QUALIFICATIONS

Q. Please state your name and position.

My name is Clay Deanhardt. I am Senior Counsel for Covad Communications Company. My responsibilities include ensuring incumbent LEC compliance with Covad's interconnection agreements and the 1996 Act, and negotiating and arbitrating interconnection agreements with incumbent LECs. Part of my job responsibilities is to advocate Covad's policy positions before state commissions.

I am one of the attorneys working on the Texas arbitration between Covad and Southwestern Bell Telephone Company ("SWBT"), a subsidiary of SBC Communications, Inc. ("SBC"). I have been with Covad since January of 1999. Prior to joining Covad, I worked as an attorney in private practice in matters involving a number of areas, including telecommunications law.

Q. Please describe Covad Communications Company.

Covad is a competitive local telecommunications service provider focused *entirely* upon deployment of competitive xDSL services nationwide. Founded in October, 1996, Covad was one of the first companies to take advantage of the pro-entry policies of the 1996 Act and implementing regulations as they relate to advanced, DSL services. These principles permit companies like Covad to collocate in the central offices of incumbent LECs like SBC and Ameritech, and obtain access to unbundled local loops that are conditioned to provide high-bandwidth xDSL services.

1 Covad has engaged in a nationwide entry strategy, encompassing collocation in
2 1000 ILEC central offices by the end of 1999. Covad's planned network deployment by
3 the end of this year will cover 51 MSAs, more than 25% of the nation's homes and
4 businesses. Currently, Covad's innovative and next-generation DSL services are
5 available in fifteen geographic regions and 36 MSAs. Covad launched its service in the
6 Chicago area on April 28, 1999, and Covad plans to collocate in and provide service from
7 dozens of central offices in the State of Illinois. Covad is the only competitive xDSL
8 provider that markets both residential and business DSL services.

9 **II. PURPOSE AND SCOPE**

10 **Q. What is the purpose of your testimony?**

11 The purpose of my testimony is to address issues raised by Chairman Mathias in
12 his letters to SBC-Ameritech that caused this proceeding to be reopened, and SBC-
13 Ameritech's response thereto. Covad does not believe that the SBC-Ameritech merger is
14 in the public interest. Covad has taken this position before the FCC in its current review
15 of this merger. However, if the Commission were to approve the merger, that approval
16 should be subject to certain conditions, as follows:

- 17 ■ First, the Commission should require SBC-Ameritech to post a \$300 million
18 performance bond to ensure compliance with Sections 251 and 252 in Illinois and
19 with the conditions of the merger. Interest on the bond could be used to fund
20 enforcement efforts by the Illinois Commerce Commission (such as additional
21 staff and authorized travel) and to fund the Community Technology and
22 Consumer Education Funds.

1 ■ The Commission should insist that SBC-Ameritech modify Interconnection
2 Commitment A so that it will make available, upon a carrier's request, any
3 method, term or condition of interconnection and nondiscriminatory access to
4 unbundled network elements that SBC-Ameritech offers or provides in any other
5 states, *i.e.*, including arbitrated terms and conditions.

6 In addition, I am also submitting testimony to bring to the Commission's attention
7 facts that have come to light in the last two months in an interconnection arbitration in
8 Texas between Covad and SBC's subsidiary, Southwestern Bell Telephone Company
9 ("SWBT"), that are highly relevant to the Commission's review of the SBC-Ameritech
10 merger. In that proceeding, SWBT has engaged in intentional and dilatory discovery
11 abuses that demonstrate a callous disregard to SWBT's obligations of compliance with
12 Section 251 of the Act in Texas with regard to unbundled access to DSL CLECs like
13 Covad. If the Commission approves the merger between SBC and Ameritech, it must
14 bear in mind the callous disregard that SBC's subsidiary has shown to the regulatory
15 process in Covad's arbitration. In short, if the Commission chooses to place conditions
16 on the merger, those conditions must be crafted strictly and with this demonstrated
17 conduct in mind in order to ensure compliance.

18 **III. SBC-AMERITECH SHOULD BE REQUIRED TO POST A**
19 **PERFORMANCE BOND**

20
21 **Q. Please describe Covad's performance bond proposal.**

22 Covad supports Chairman Mathias's suggestion in Issue 11(e) in the attachment
23 to his June 15th letter that SBC consider posting a performance bond that would be
24 payable in the event of non-compliance.

1 Covad has argued before the FCC that a merged SBC-Ameritech be required to
2 post a reasonable performance bond, payable to the harmed CLEC, for violations of the
3 interconnection and unbundled access provisions of the Act. We believe the bond should
4 be substantial – \$1 billion for the entire Ameritech region. A commensurately-sized bond
5 in Illinois would amount to approximately \$300 million.

6 **Q. Would posting such a bond impose a financial burden on SBC and**
7 **Ameritech?**

8 Given SBC's claims of multi-billion dollar efficiencies from this merger, posting
9 this bond should not pose a long-term burden on SBC-Ameritech. SBC-Ameritech could
10 be given the opportunity to build up this bond over a period of 3-4 years.

11 In their Direct Testimony on Re-Opening, SBC and Ameritech have proposed to
12 undertake significant financial funding for several public interest and charitable causes.
13 Covad believes that a performance bond could be combined with these financial
14 commitments. The bond could be held in an interest-bearing escrow account, and interest
15 on this bond could be used to fund ICC enforcement efforts, the Community Technology
16 Fund, Consumer Education Fund, and SBC-Ameritech's Illinois charitable donations.

17 **IV. SBC-AMERITECH SHOULD BE REQUIRED TO OFFER IN ILLINOIS**
18 **TERMS AND CONDITIONS OF INTERCONNECTION AND ACCESS**
19 **ORDERED IN STATE ARBITRATIONS IN OTHER STATES**
20

21 **Q. Please describe Covad's proposal to modify Interconnection Commitment A.**

22 Covad proposes that Interconnection Commitment A be revised to require SBC-
23 Ameritech to offer, upon request, Illinois CLECs any method, term or condition of
24 interconnection and nondiscriminatory access to unbundled network elements that SBC-
25 Ameritech offers or provides in other states – even if those terms and conditions were the

1 subject of a state proceeding or arbitration. The Illinois Commerce Commission would
2 retain the ability to establish the appropriate rates for these methods, terms, or conditions
3 of interconnection and access. In addition, the Commission would retain the ability to
4 alter or modify a particular method, term or condition in the Section 252 approval
5 process. Until such a decision were made, however, SBC-Ameritech would be required
6 to offer and provide the method, term or condition to requesting carriers.

7 **Q. Why is SBC-Ameritech's Interconnection Commitment A insufficient?**

8 It is a very limited proposal. Interconnection Commitment A (made in response
9 to Chairman Mathias's Question No. 2 in Attachment A to his June 4th letter) states that
10 SBC-Ameritech will only offer terms and conditions of interconnection and access that
11 SBC "voluntarily" agrees to provide to CLECs in other states. From the perspective of
12 the Commission and the public interest, there is no rational reason for SBC-Ameritech to
13 distinguish between "voluntary" terms and "arbitrated" terms.

14 The results of interconnection arbitrations must be taken seriously. A requesting
15 carrier that chooses to arbitrate an issue against an ILEC takes a large risk: (1) its
16 business plan may be put on hold for several months; (2) it may sour a relationship with
17 its key supplier, the ILEC; and (3) it will face regulatory uncertainty that may hamper
18 investor confidence in the viability of requesting carrier's business plan. For instance, I
19 believe that Covad's entry into Texas was delayed at least six months due to our pending
20 arbitration with SBC in that state.

21 As a result, Covad (and other start-up CLECs) do not enter into arbitrations
22 lightly, and we do not do so frequently. Unfortunately, Covad has found that only

1 through the devices of litigation and arbitration have we been able to make progress in
2 obtaining collocation and unbundled elements from SBC and its affiliates.

3 For example, Covad is currently engaged in several levels of arbitration and
4 litigation with SBC's California subsidiary, Pacific Bell. As previously described by ICC
5 Staff Witness Rasha Toppozada-Yow in this proceeding, Covad has successfully won an
6 American Arbitration Association arbitration award from Pacific Bell in California.
7 SBC's SWBT affiliate also resisted offering Covad efficient forms of collocation, such as
8 cageless collocation, prior to the release of FCC's March 31, 1999 *Advanced Wireline*
9 *Services Order*. Even then, SWBT originally would only agree to begin processing
10 cageless applications after the effective date of the FCC's order and wanted to include
11 provisions in the agreement that would allow SWBT to immediately cut off Covad's
12 service if the FCC's cageless requirement was stayed or overturned on appeal. Covad was
13 only able to obtain more realistic terms for cageless physical collocation because of the
14 pressure of the pending arbitration.

15 Our experience tells us that SBC-Ameritech's proposal would only encourage
16 SBC and Ameritech to arbitrate every questionable issue in all other states – because in
17 doing so, they would minimize the number of “voluntary” commitments they would have
18 to make available in Illinois.

19 In summary, what SBC-Ameritech promise to provide in Interconnection
20 Commitment A – “voluntary” terms – will not amount to much. In general, non-
21 arbitrated clauses are not arms-length arrangements, and they are “voluntary” only in the
22 sense that the requesting carrier has “voluntarily” decided that it was better off getting
23 into business in a state with a markedly inferior interconnection agreement than to be shut

1 out of the state entirely. ILECs like SBC understand this motivation and use the leverage
2 to the hilt. The most significant issues – such as the rates, terms and conditions of
3 nondiscriminatory access to collocation and unbundled xDSL loops – are resolved more
4 favorably to CLECs in arbitrations.

5 **Q. How would Covad's proposal promote competitive entry?**

6 Requiring SBC-Ameritech to offer Illinois CLECs the results of state arbitrations
7 in other states would promote the rapid development of local competition in Illinois.

8 Sections 251 and 252 of the 1996 Act set in motion a system in which state commissions
9 can arbitrate and resolve disputes between requesting carriers and incumbent LECs.

10 Unfortunately, with regard to important issues such as loop availability, spectrum
11 management policy, OSS access and collocation rights, Covad (and other CLECs) have
12 had to face extensive, state-by-state proceedings in order to implement our statutory right
13 for nondiscriminatory access to interconnection and unbundled network elements.

14 Oftentimes, a CLEC like Covad must settle for “second (or third, or fourth) best”
15 agreements in certain states because resource requirements and business necessity mean
16 that arbitrating in every state is not an option. Because every month of arbitration is a
17 month in which CLECs like Covad cannot enter the market or provide more efficient
18 service to consumers, ILECs like SBC and Ameritech have an incentive to continue this
19 litigious, state-by-state process. The reality is that requesting carriers cannot afford to
20 litigate every issue in every state, and this Commission does not have the resources to
21 litigate every issue in Illinois. As proposed by SBC-Ameritech, Interconnection
22 Commitment A does nothing to solve that problem and indeed could make it worse.

1 **Q. How does Covad’s proposal mitigate that problem?**

2 Covad’s proposal would remove the effective “veto” power that Ameritech
3 currently has – the power to refuse unilaterally a method, term or condition and demand
4 that the CLEC put its business case on hold and at risk until the issue can be resolved in
5 an interconnection arbitration proceeding in Illinois.¹ Under Covad’s proposal, SBC-
6 Ameritech would, at the request of a carrier, be required to offer in Illinois any method,
7 term or condition of interconnection or access that SBC-Ameritech offers or provides in
8 another state, even if that method, term or condition was the result of an arbitration.

9 Since the Commission must review and approve every interconnection agreement
10 pursuant to Section 252, it would still have the ability to review and assess these
11 particular methods, terms and conditions of interconnection and access. The benefit of
12 Covad’s proposal is that Illinois CLECs would *not* have to endure unilateral rejections
13 and delays by SBC-Ameritech over these methods, terms and conditions. Instead, SBC-
14 Ameritech would be required to provide those methods, terms and conditions in
15 interconnection negotiations, and the Commission could review the appropriateness of
16 those methods, terms and conditions in the interconnection agreement review process.

17 **Q. How could SBC-Ameritech’s current Interconnection Commitment A harm**
18 **the public interest?**

19 Adoption of SBC-Ameritech’s Interconnection Commitment A without Covad’s
20 proposed modification would be bad for consumers in Illinois because they would be
21 denied rapid entry by innovative entrants such as Covad. As discussed above, the

¹ This risk is particularly acute when it comes to methods, terms and conditions of collocation. The first step Covad takes in entering a market is to order dozens of collocation spaces. Waiting nine months or longer for the methods, terms and conditions of cageless collocation to be resolved through an interconnection arbitration is, literally, nine months of delayed roll-out.

1 interconnection arbitration process delays entry through efficient means of
2 interconnection or access – every month spent in arbitration is a month in which Illinois
3 CLECs are denied demonstrably efficient means of interconnection or access.

4 Indeed, as proposed, Interconnection Commitment A would actually encourage
5 SBC-Ameritech to litigate even more issues in other SBC-Ameritech states so that they
6 will not have to offer those terms in Illinois. This situation would delay entry into Illinois
7 because CLECs like Covad would have to spend resources arbitrating in Missouri,
8 Indiana, and Wisconsin, rather than concentrate those resources on building advanced,
9 innovative networks in Illinois.

10 **Q. How would Covad's proposal assist the Commission in regulating the**
11 **merged SBC-Ameritech?**

12 The Illinois Commerce Commission should welcome the results of state
13 arbitrations, because other state commissions can, through their various processes,
14 uncover facts as to SBC's implementation of the Act that are directly applicable in
15 Illinois, an issue I will discuss in more detail later in my testimony. In my opinion,
16 Covad's proposal greatly expands the ability of the Commission to ensure that SBC-
17 Ameritech offer the most efficient methods, terms and conditions of interconnection or
18 access possible in Illinois.

19 SBC and Ameritech have said that they expect to realize efficiencies by adopting
20 "best practices" developed in SBC states in Illinois. The same should be the case for
21 methods, terms and conditions of interconnection and nondiscriminatory access to
22 unbundled network elements.

1 For instance, in Texas, Covad is currently engaged in a highly fact-intensive
2 interconnection arbitration about the core issues related to Covad's DSL service: the
3 method by which Covad will obtain nondiscriminatory access to xDSL-compatible loops,
4 SBC's DSL spectrum management policy, and OSS (including access to fundamental
5 network information). These issues directly relate to the manner in which SBC intends to
6 roll out DSL services and the methods it will use to provide DSL CLECs like Covad
7 access to unbundled, conditioned loops. These DSL policies and procedures will no
8 doubt cut across state lines, and the Illinois Commerce Commission would be well-
9 served by taking notice of this Texas proceeding. In fact, the Illinois Commerce
10 Commission will have to deal with the issues raised by the Texas arbitration at some
11 time, and it would be a waste of the Commission's time to re-litigate issues and facts that
12 already have been resolved or uncovered in another state.

13 **Q. Would Covad's proposal hinder the Illinois Commission's ability to**
14 **implement state-specific policies any more than Interconnection**
15 **Commitment A would, as SBC-Ameritech suggest?**

16 No. SBC Witness Kahan claims (Direct, p. 13) that an obligation to offer
17 arbitrated terms in other states in Illinois would cause this Commission to "abrogate its
18 authority to other state commissions" and would interfere with the Commission's ability
19 "to make its own legal and policy determinations." This is plainly untrue. As discussed
20 above, the Commission would still review interconnection agreements pursuant to
21 Section 252. Requiring SBC-Ameritech to offer a method, term or condition arbitrated in
22 another state to Illinois CLECs in interconnection negotiations does not remove the
23 Commission's Section 252 authority or the authority it has under the Illinois Public

1 Utilities Act. What Covad's proposal does do is help remedy the negotiating power in
2 interconnection negotiations because SBC-Ameritech will no longer be able to say flatly
3 "No" and force arbitration in Illinois over a method, term or condition it provides in
4 another state.

5 In fact, SBC-Ameritech's Interconnection Commitment A – which would require
6 SBC-Ameritech to offer *voluntarily* agreed-to terms in other states in Illinois – has the
7 *same* impact upon this Commission's authority as Covad's proposal would. For instance,
8 if SBC voluntarily agrees to provide access to remote terminal devices for xDSL CLECs
9 in Missouri, Interconnection Condition A would *mandate* that SBC-Ameritech offer that
10 same arrangement in Illinois. In this case, SBC-Ameritech has no objection to this
11 "abrogat[ion]" of the Illinois Commission's authority. The same potential for
12 "conflicting" methods of access would exist (for instance, if a different voluntary method
13 of access to the remote terminal was made available by SBC in Nebraska). Yet, if SBC
14 loses an arbitration in Missouri on this same issue of access to remote terminals, SBC
15 argues that the Illinois Commission would "abrogat[e] its authority" by requiring SBC to
16 offer that term in Illinois.

17 SBC-Ameritech has put forward a jurisdictional strawman. From the perspective
18 of the Illinois Commission's jurisdiction, there is no real difference between voluntary
19 terms and arbitrated terms – except for the fact SBC-Ameritech knows that arbitrated
20 terms are generally more favorable to CLECs than purely voluntary matters.

21

22

23

1 **Q. How would the Illinois Commission's authority be enhanced by Covad's**
2 **proposal?**

3 Requiring SBC-Ameritech to offer Illinois CLECs on request pro-competitive
4 methods, terms and conditions of interconnection and access would make Illinois a state
5 where pro-competitive "best practices" of a dozen other states would reign. Covad's
6 proposal would allow the Illinois Commerce Commission to leverage quickly expertise
7 developed in other states on a particular issue in a manner that would benefit Illinois
8 consumers as soon as possible.

9 As discussed above, the Commission still must approve every interconnection
10 agreement pursuant to Section 252 of the Act. Covad's proposal would not have the
11 Commission "abrogate" any of that authority. The only real change here would be to
12 speed up the process considerably – by requiring SBC-Ameritech to offer all methods,
13 terms and conditions available in other states, an agreement containing those terms would
14 be filed before the Commission without the enduring marathon of an arbitration
15 proceeding. Upon filing of the agreement, the Commission could then review those
16 methods, terms or conditions under its Section 252 authority. Accelerating the process in
17 this way would deny SBC-Ameritech the unilateral right they now have to veto or delay
18 availability of a particular method, term or condition of entry and force an arbitration in
19 all cases.

20 In summary, the restriction in SBC-Ameritech's proposed Interconnection
21 Commitment A is hardly based upon SBC-Ameritech's supposed "interest" in
22 "protecting" this Commission's authority. Instead, SBC-Ameritech simply seek to hide

the results of other state arbitrations from this Commission. And, as discussed below, SBC has a lot to hide.

V. SBC'S CONDUCT IN THE COVAD/ACI TEXAS ARBITRATION

Q. Please describe briefly the Texas arbitration between Covad and SBC's subsidiary, SWBT.

Covad and Accelerated Connections, Inc. ("ACI"), another national DSL CLEC, are currently arbitrating the rates, terms and conditions of the availability of critical unbundling provisions and OSS access in our interconnection agreements that are essential to the provision of competitive, advanced xDSL services in Texas.² The issues remaining in this arbitration are:

- (a) DSL Spectrum Management: SWBT wants the ability to implement a form of spectrum management it refers to as selective feeder separation ("SFS"). SFS involves the segregation of binder groups for ADSL and POTS only. SWBT's proposal would have two critical anticompetitive effects. First, it would reduce the number of available loops for DSL services other than ADSL. Second, it would create a digital ghetto for SDSL and IDSL, the digital services preferred by many users, by forcing the CLECs to use loops closer to interfering AMI T1 technologies. Covad and ACI believe the outside plant should be managed to accommodate the maximum amount of all DSL technologies, not just SWBT's preferred technology.

² Collocation was a large issue in this arbitration until the FCC's March 31, 1999 order. After the FCC issued the order, Covad and SWBT entered into another period of intense negotiations that finally resulted in an agreement on collocation issues.

1 (b) OSS Access: SWBT is proposing a loop pre-qualification, qualification,
2 ordering and provisioning process that could result in SWBT taking up to six
3 weeks to fulfill some loop orders. Covad and ACI are proposing a process
4 that would result in all loop orders being processed and filled, from beginning
5 to end, on intervals between 5 and 15 business days (with the longest intervals
6 reserved for loops where facilities issues must be resolved). Covad and ACI
7 are also proposing direct, read-only access to SWBT's network databases so
8 we can have immediate, accurate information regarding the network for our
9 ordering and provisioning process.

10 (c) Costs: SWBT is proposing very high non-recurring charges for loop
11 conditioning, some of which exceed its retail tariffed rate for the same service.
12 Covad and ACI believe that conditioning costs are properly included in the
13 TELRIC pricing calculations for a forward-looking network.

14 **Q. Why is SWBT's conduct in the Covad/ACI Arbitration important to this**
15 **merger proceeding?**

16 The pending arbitration between Covad, ACI and SWBT in Texas is relevant to
17 this proceeding for two reasons:

- 18 ■ It demonstrates that SBC-Ameritech's Interconnection Commitment A (the
19 refusal to offer arbitrated terms and conditions) is an empty promise. The
20 Covad/ACI Arbitration is a key cog in SWBT's 271 efforts in Texas and the
21 results of the arbitration will play an important role in SWBT's 271 application in
22 Texas, referenced by Chairman Mathias in his June 15, 1999 Letter, Item 2(a)(ii).
23 Covad expects most, if not all, of the interconnection agreement resulting from

1 the arbitration will be incorporated into the "Proposed Interconnection
2 Agreement" ("PIA") SWBT must adopt as a 271 requirement in Texas. However,
3 since these terms were arbitrated, SBC-Ameritech would not make them available
4 in Illinois under Interconnection Commitment A.

- 5 ■ The arbitration brought to light several disturbing facts about SWBT's conduct in
6 the proceeding that the Commission should be aware of as it is considering
7 whether to permit SBC to acquire Ameritech. We believe the facts surrounding
8 the arbitration demonstrate callous disregard to regulatory proceedings. As a
9 result, even if the Commission approves this merger with conditions, it should
10 tailor those conditions with SBC's demonstrated conduct in mind.

11 **Q. Describe the relationship between the Covad/ACI Arbitration and SWBT's**
12 **Texas 271 Application and the Texas PUC Staff's "Proposed Interconnection**
13 **Agreement."**

14 The Covad/ACI arbitration in Texas is a watershed event in SWBT's 271
15 application in Texas. Indeed, one of the arbitrator's in the Covad/ACI arbitration, who is
16 also the Judge conducting SWBT's 271 petition in Texas, stated several times that the
17 outcome of the Covad/ACI arbitration will be incorporated into the generic "Proposed
18 Interconnection Agreement" ("PIA") that is the centerpiece of SWBT's Texas 271
19 efforts. SWBT's efforts in Texas have become an issue in this merger proceeding. In
20 particular, SBC and Ameritech (Dysart Supplemental, pp. 2-3) are refusing to offer the
21 "arbitrated" provisions of that Texas PIA to Illinois CLECs. As a result, under proposed
22 Interconnection Commitment A, the results of the Covad/ACI arbitration would not be
23 available to Illinois CLECs. Consequently, the Illinois Commerce Commission would no

1 doubt have to arbitrate these same issues with SBC-Ameritech in the near future. And as
2 I describe below, getting to the bottom of these issues in arbitration has been exceedingly
3 difficult, given SWBT's pattern of deliberately obstructing and delaying discovery to
4 prevent Covad and the Texas arbitrators from having a complete factual record upon
5 which to base these important policy decisions.

6 **Q. Why would SBC's refusal to provide Illinois CLECs the benefits of the**
7 **Covad/ACI Arbitration harm competition in Illinois?**

8 The terms and conditions at issue in the Covad/ACI arbitration are absolutely
9 critical issues related to competitive deployment of DSL services over unbundled loops in
10 Illinois. SBC has made it a point that SBC's "expertise" in ADSL service (which
11 Ameritech apparently lacks) is a benefit of the merger, and SBC and Ameritech have
12 committed to deploy ADSL service in Illinois as a condition of the merger (Additional
13 Commitment F). Yet at the same time, SBC-Ameritech would deny Illinois CLECs with
14 immediate nondiscriminatory access to unbundled, xDSL loops. The result would be to
15 harm competition in Illinois in the market for broadband, advanced services. Only
16 through the arbitration process have we been able to uncover the truth about SBC's
17 attitude, policies, practices and procedures with regard to unbundling loops that support
18 next-generation xDSL networks. If this Commission accepts SBC's current proposal,
19 wholesale portions of the Texas "Proposed Interconnection Agreement" would not be
20 available in Illinois and would presumably have to be arbitrated once again in this State.
21 And there is no telling what level of discovery abuse SBC may undertake in a similar
22 proceeding in Illinois.

1 **Q. Please summarize SWBT's conduct in the Covad/ACI Arbitration.**

2 SWBT's conduct in the Covad/ACI Arbitration involved numerous discovery
3 abuses, which we discovered after the Texas Arbitrators ordered in April that discovery
4 be re-opened. Unfortunately, I cannot describe all of SWBT's conduct in detail at this
5 time as a result of a protective order that has been issued in the Covad/ACI Arbitration
6 proceeding. Attachment 1 to my testimony is a true and correct copy of that protective
7 order. What I can say, however, is that it appears that SWBT engaged in an orchestrated
8 campaign to prevent Covad and the Arbitrators from obtaining and reviewing important
9 information regarding the central issues in the arbitration. Some of the publicly discussed
10 violations include:

11 (1) Failing to produce responsive, relevant documents, including SWBT's *ADSL*
12 & *VDSL Methods and Procedures*, prior to the April 14, 1999 arbitration
13 hearing. The mid-arbitration discovery of this document by Covad caused the
14 Arbitrators to order an abrupt end to the hearings, order that discovery be re-
15 opened, and reschedule the hearings for June.

16 (2) Failing to search for requested documents from SWBT employees developing
17 and implementing its retail and wholesale DSL strategies.

18 (3) Delaying production of critical documents during the re-opened discovery
19 until after depositions were completed so that Covad could not question
20 SWBT's witnesses about the documents.

21 (4) Producing nearly 2/3 of the total volume of documents produced in the
22 arbitration after Covad filed direct testimony and less than one week before
23 the re-commencement of the arbitration. This tactic prevented Covad from

1 being able to effectively review and prepare potential evidence for the
2 Arbitrators' consideration.

3 (5) Of all the responsive documents SWBT ultimately produced, approximately
4 only 7% were produced prior to the first arbitration hearing in April, 1999.

5 (6) Offering as witnesses only members of SWBT's cadre of "professional"
6 witnesses who are not directly involved in SWBT's DSL implementations.

7 (7) Improperly redacting and withholding documents to prevent discovery of
8 information that may be contrary to SWBT's position. Some of the redacted
9 documents include e-mails between SWBT and other RBOCs about DSL
10 methods and procedures.

11 **Q. Why are these actions relevant to this proceeding?**

12 The conduct uncovered in the Covad/ACI arbitration demonstrates a callous or
13 hostile SBC corporate attitude towards the truth-seeking function of the state commission
14 process that will, in my opinion, severely hamper the Illinois Commerce Commission's
15 ability to regulate and enforce its rules. As a result, if the Commission decides to
16 approve this merger with conditions, it must take into account the history of SBC's
17 conduct in crafting strong and enforceable conditions.

18 Even after SBC's abuses began to become uncovered, SBC has remained
19 recalcitrant. After the first arbitration hearing in Texas, SWBT was given the chance to
20 cure its abusive behavior through a second round of discovery and depositions that would
21 lead to a second arbitration hearing. Instead of taking advantage of this chance, SWBT
22 relied again on the same tactics of intentional delay. As a result, SWBT did not produce
23 nearly 70% of the responsive documents until *after* this subsequent round of depositions

1 was held and *after* re-direct testimony was due. The production was made only after
2 repeated requests by Covad and ACI to SWBT and the arbitrators.

3 These discovery abuses have had a significant substantive impact upon the
4 Covad/ACI arbitration. Covad and ACI have had to endure months of delay in final
5 resolution of these matters and have spent hundreds of hours that should have been
6 unnecessary.

7 **Q. Do you believe SBC's actions in the Covad/ACI Arbitration to be an isolated**
8 **occurrence?**

9 No. In fact, I believe they represent a policy of hostility toward and callous
10 disregard for regulatory proceedings that should deeply concern the Illinois Commerce
11 Commission.

12 SBC is a large, multinational and sophisticated company that, like all multi-billion
13 dollar corporations, has no doubt been involved in a lot of litigation. It has the in-house
14 legal firepower and knowledge to do the discovery and arbitration process "right" if it
15 wants to. In fact, it even has an entire department devoted solely to document
16 productions. One would think that the Covad/ACI arbitration – a precedent-setting and
17 closely-watched proceeding that has large implications for SBC's 271 application in
18 Texas – would have been a case in which SBC would not skimp on resources. Yet the
19 abuses occurred, and SBC did not devote sufficient resources to this arbitration until after
20 repeated requests from Covad to the Texas Commission. As a result, I do not believe that
21 the facts recited above are unintentional and isolated "mistakes."

22 My belief was further confirmed last week by a Consent Decree issued by the
23 Federal Communications Commission closing an investigation into SBC's conduct in the

1 SBC-SNET merger proceeding, which is Attachment 3 to my testimony. As part of the
2 Consent Decree, SBC made a payment of \$1.3 million to the U.S. Treasury, agreed to
3 adopt a new compliance plan to ensure “future compliance” with Sections 271 and 272 in
4 the context of mergers, and also agreed to create a “training program on the obligations of
5 SBC employees when they are meeting with the FCC.” In addition, senior SBC
6 corporate officers submitted declarations to the FCC stating that they did not have
7 knowledge of the conduct of SBC employees that formed the subject of the FCC’s
8 investigation.³

9 It is important for this Commission to take notice of the FCC’s investigation into
10 SBC’s behavior in the SBC-SNET merger and weigh it appropriately.

11 **Q. Why did Covad not bring the facts of its Texas arbitration to the attention of**
12 **this Commission earlier?**

13 Covad and ACI only began to uncover SWBT’s misconduct on April 14, 1999,
14 during the actual Texas arbitration hearing. By that time, the record in this merger
15 proceeding was closed. Since April 14, I have spent in excess of 300 hours of my time
16 investigating SBC’s actions, conducting discovery, depositions and drafting motions.
17 This testimony is only a brief summary of Covad’s findings. Moreover, this testimony
18 responds directly to Chairman Mathias’s stated concerns regarding enforcement of any
19 conditions of the merger.

20

³ This Consent Decree is evidence of what we have referred to in Texas as SBC’s practice of creating “plausible deniability” for its witnesses and officers. We saw this in Texas when SBC offered witnesses with no real knowledge of SBC’s DSL implementation plans. Accordingly, when the Arbitrator’s asked specific questions regarding those plans, these witnesses were unable to respond.

1 **Q. Please summarize once again why you believe these facts are relevant to this**
2 **merger proceeding.**

3 The issue in the Covad/ACI Arbitration is whether SWBT is and will comply with
4 the Telecom Act in its interconnection agreements with DSL CLECs like Covad.
5 Resolution of that question is highly relevant nationwide in all current and potentially
6 future SBC states, such as Illinois. But instead of engaging us on the merits, SBC instead
7 chose to abuse that process by hiding and covering up the truth.

8 As I discussed earlier, Chairman Mathias has asked SBC and Ameritech whether
9 they would provide the terms and conditions of access and interconnection SBC makes
10 available in other states in Illinois, and Chairman Mathias made a particular reference to
11 Texas. When posed this question, SBC again faced a choice. SBC could have stepped
12 up to the plate and proposed to offer pro-competitive terms and conditions of access and
13 interconnection developed by other state commissions in Illinois. Or it could choose to
14 engage in more delay and attempt to hide from Illinois consumers the pro-competitive
15 methods, terms and conditions of access and interconnection developed in other SBC
16 states.

17 SBC chose the second path. This path is a sure road to more rounds of arbitration
18 and litigation before this Commission. And in these subsequent Illinois arbitrations, how
19 can this Commission and the public be assured that SBC will not engage in the same
20 dilatory and deliberate discovery abuses that it used in Texas?

21

22

23

VI. SUMMARY AND CONCLUSION

Q. Please summarize your testimony.

As I state above, Covad does not believe that the merger of SBC and Ameritech is in the public interest. However, in the event that the Commission decides to approve this merger with certain conditions, Covad believes that those conditions must ensure that SBC-Ameritech will implement pro-competitive policies, and that those commitments are enforceable. In this testimony, I have provided focused comments on SBC's and Ameritech's amended joint petition, taking into account Chairman Mathias's detailed questions. In summary, Covad believes that –

- (1) The Commission should require SBC-Ameritech to post a \$300 million performance bond to ensure enforcement and compliance with any merger conditions and Section 251 of the Act.
- (2) The Commission should require that SBC-Ameritech, upon request by a carrier, offer and provide any method, term or condition of interconnection or access to unbundled network elements that SBC-Ameritech offers or provides in any other SBC-Ameritech state, regardless as to whether that method, term or condition of interconnection or access was voluntarily provided by SBC-Ameritech or whether such method, term or condition was the subject of an interconnection arbitration.
- (3) In drafting conditions and determining enforcement mechanisms, the Commission must take notice of SBC's demonstrable and callous disregard to the regulatory process, made clear by its conduct in the Covad/ACI arbitration.

1 **Q. Does this conclude your testimony?**

2 Yes, it does.